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APR 8 1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 897

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, Principal Chief and member of the Osage Tribe of Indians, on behalf of said Tribe and the members thereof, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the Interior of the United States, and TOM H. FRALEY, Treasurer of Osage County, Pawhuska, Oklahoma, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

THOMAS P. GORE,
LESLIE C. GARNETT,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, the appellants below, pray a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on the 11th day of January 1943 (R. 55) affirming the judgment of the District Court of the United States for the District of Columbia in sustaining a motion to dismiss the complaint.

OPINIONS BELOW.

The three judge statutory court rendered an opinion refusing to pass on the motion to dismiss and remitted the case to Mr. Justice Letts sitting as a single judge (R. 27-39), who granted the motion to dismiss (R. 13). The opinion of the United States Court of Appeals for the District of Columbia is found at (R. 54).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 11th day of January 1943 (R. 55) and the jurisdiction is invoked under Section 240a of the District Code as amended February 13, 1935, 28 U. S. C. Section 347.

QUESTION PRESENTED.

The complaint (R. 2) sought an injunction to restrain the defendant Secretary of the Interior from paying and the defendant Treasurer of Osage County, Oklahoma from receiving the sum of $1,535.70, part of the proceeds of royalties from gas and oil leases which had been executed by the tribal council. The royalties thus received were required by the Act of June 28, 1906 (R. 20) to be placed by the Treasurer of the United States to the credit of the members of the tribe for the use and benefit of the individual members thereof. This Act of March 3, 1921 (R. 24) placed an additional burden equal to 1 per cent upon the royalties received by the tribe for the construction and maintenance of roads and bridges in Osage County. The $1,535.70 which the complaint sought to enjoin the Secretary of the Interior from paying, was the undistributed residue of the 1 per cent fund and was in addition to the $1,092,338.17 which the Secretary of the Interior had already paid to Osage County for the construction of roads and bridges, prior to its discontinuance in the Act of April 25, 1940 (R. 25).

The complaint alleged that the provision of Section 5 of the Act of March 3, 1921 authorizing the Secretary of the

Interior to pay this additional sum of 1 per cent of the royalties was arbitrary, capricious, confiscatory, was inconsistent with the obligation due from the United States to its wards and with the express trust declared in the deed of indenture, was an unconstitutional taking of the Indian property or moneys and was repugnant to the Constitution in that it deprived the Indians of their property without compensation or without due process of law.

The three judge statutory court and the Court of Appeals refused to consider the constitutionality of the Act in question on the ground that the United States was an indispensable party to the suit. The three judge statutory court said in its opinion that whether or not the constitutionality of this statute "can even be tried depends upon whether the United States consents to be sued." (R. 33)

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals held that the decision of the statutory court was in all respects correct, and on its opinion affirmed the order dismissing the suit. (R. 54.) It is admitted by the courts below that Section 5 of the Act of March 3, 1921 placed a burden exceeding $1,000,000 upon the Indians' royalties when no such burden is placed upon other like property in Osage County. The Indians constitute about 1100 inhabitants of Osage County, Oklahoma, out of a total population of about 40,000. Thus it appears that without determining whether this is a constitutional burden upon the Indians' royalties, both courts below hold that even if it is unconstitutional, the Indians are without redress save by an Act of Congress, and the indispensability of the United States as a party precludes the possibility of this question being determined by the courts. We assert that this is a grave injustice to the Indians, a violation of the duties of the United States as trustee in an express trust and in violation of the Constitution of the United States. For these reasons, the writ of certiorari should be granted for the protection of the Indian wards of the Government as a class.

SPECIFICATION OF ERRORS.

1. Both courts below erred in sustaining the motion of the defendants to dismiss the complaint.

2. Both courts below erred in not denying the motion to dismiss the complaint.

3. Both courts below erred in not first determining the constitutionality of Section 5 of the Act of March 3, 1921, before holding and deciding that the United States was an indispensable party to this suit.

ARGUMENT.

The United States is not an indispensable party to this suit to restrain the Secretary of the Interior from exercising an authority to confiscate the property of the Indian tribe and its members.

The three judge court based its conclusion that the United States was an indispensable party on *Morrison* v. *Work*, 266 U. S. 42. We assert that this case comes within the class of cases excepted from the decision in *Morrison* v. *Work* by Mr. Justice Brandeis who wrote the opinion. Speaking for a unanimous court, Justice Brandeis said:

> "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, *or that Congress lacked the power to confer the authority exercised.*" (p. 486) (Italics ours)

The instant case, on the other hand, is identical with those cases "in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground * * * that Congress lacked the power to confer the authority exercised." This point and this distinction was expressly

recognized and accentuated in *Barr* v. *Rhodes*, 35 Fed. Supp. 223, 224, 225. There the court said:

> "The defendant contends that the action is one in effect against the United States and that the United States cannot be sued except with its consent, which consent has not been given in this matter. It is of course settled as a general proposition that the United States cannot be sued without its consent. But it is also well settled that in many instances officers of the United States can be sued without it being construed as a suit against the Government. It depends upon the facts in each case as to whether or not a suit against an officer of the United States is essentially a suit against the United States. The following cases are examples of where suits against federal officials were dismissed because they were essentially suits against the United States. (Citing cases, one of which is *Morrison* v. *Work*) Examples of where suits against federal officials have been permitted are the cases of (citing cases). The opinion in *Morrison* v. *Work, supra*, recognizes the right to grant relief by injunction against the head of an executive department or other officer of the government when the official act complained of was not within the authority conferred or was an improper exercise of such authority, or when Congress lacked the power to confer the authority exercised. The distinction between the two classes of cases was pointed out by the court in *Philadelphia Co.* v. *Stimson, supra* (223 U. S. 605, 32 S. Ct. 345, 56 L. ed. 570) as follows: 'Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant which is the basis of the decree'."

In the case of *Ickes* v. *Fox*, 300 U. S. 82, 96, 81 L. ed. 525, the court said that the suits in that case were—

> "brought to enjoin the Secretary of the Interior from enforcing an order the wrongful effect of which will be to deprive respondents of vested property rights * * *. That such suits may be maintained without

the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 176, 37 L. ed. 123, 125-127, 13 S. Ct. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 56 L. ed. 570, 576, 32 S. Ct. 340; Goltra v. Weeks, 271 U. S. 536, 544, 70 L. ed. 1074, 1078, 46 S. Ct. 613; Work v. Louisiana, 269 U. S. 250, 254, 70 L. ed. 259, 262, 46 S. Ct. 92; Payne v. Central P. R. Co., 255 U. S. 228, 238, 65 L. ed. 598, 603, 41 S. Ct. 314. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the Stimson Case."

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. (The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.)

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States." (p. 619-260)

The decision of the court below is in conflict with the quoted language of *Morrison* v. *Work*, *supra;* is in conflict with *Philadelphia Co.* v. *Stimson*, *supra*, and the cases therein cited. It is further in conflict with the opinion of the court in *Barr* v. *Rhodes*, 35 Fed. Supp. 223, where the court construes *Morrison* v. *Work*, *supra*, as recognizing the right to grant injunctive relief against an officer of the Government acting under a statute which Congress had no power to enact. Specifically confirming the petitioners'

position that whether or not a public officer can be sued for his acts done under color of his office depends upon whether or not those acts were lawful, and that the legality of such acts will be first determined, is *Banco de Espana* v. *Federal Reserve Bank,* 114 Fed. (2nd) 438, where Judge Clark writing the opinion of the Circuit Court of Appeals discusses this question with care.

We further insist if *Morrison* v. *Work, supra,* can be given the interpretation placed upon it by the courts below that even though an Act of Congress is unconstitutional the United States is an indispensable party to a suit to restrain a public officer from enforcing such act, the case should be overruled.

If the construction placed upon it by defense counsel is correct, such counsel could stand at the bar of this court and triumphantly admit and insist that Section 5 of the Act of March 3, 1921, is null and void; could insist that the 1 per cent levied on Osage royalties for Osage County, is unwarranted and unconstitutional; could admit that the $1,000,000 heretofore paid under that Act out of Osage funds to Osage County by the Secretary was an act of confiscation and not of guardianship; and could then with an air of triumph challenge this court to know: What do you intend to do about it? The court would have no choice but to wish that the framers of the Constitution had provided effectually that no person, not even an Indian, can be deprived of property without due process of law, without compensation, and without the owner's consent, and that the courts were clothed with power to prevent the spoliation of the Indians.

The action of the public officer in this case was not in the exercise of guardianship but was an act of confiscation in directing the payment to Osage County of money belonging absolutely to the Osage Tribe of Indians or its individual members. *Choteau* v. *Barnett,* 283 U. S. 691, 695. There is no decision which upholds the power of Congress to deal without limitations and restraint even with the "tribal property" of the Indians. The power of Congress to man-

age the property of the Indians is subject to constitutional limitations and does not enable the Government to give the lands of one tribe or clan to another or to deal with them as its own. *Chippewa Indians* v. *U. S.*, 301 U. S. 373, 375. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294. *U. S.* v. *Creek Nation*, 295 U. S. 103, 109. *Shoshone Tribe* v. *United States* 299 U. S. 476. (Holding Spoliation is not Management.)

If Congress could authorize the taking of more than $1,000,000 of the Osage royalties and giving it to Osage County for the construction of roads and bridges, it could equally direct the payment of all of the income of the Osages to Osage County, and it would seem a monstrous doctrine to hold that even though Congress had acted for the destruction of the Indian property, for its confiscation and for their spoliation, the officer could not be restrained who attempted to enforce such a statute without the consent of the Congress that enacted the statute.

We confidently assert, therefore, that the Indian wards of the Government are entitled to the protection of the courts in the determination of the validity of this Act of Congress and that if *Morrison* v. *Work*, *supra*, can be construed to hold the contrary, it should be definitely overruled. Otherwise, judicial life is given to the corpse of a void statute, and the mantle of governmental immunity is extended over the shoulders of a public officer attempting to exercise an authority which Congress had no power to confer.

CONCLUSION.

The petitioners therefore pray that a writ of certiorari may issue and upon a review the judgment of the United States Court of Appeals for the District of Columbia and the judgment of the District Court for the District of Columbia be reversed.

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OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, Principal Chief and Member of the Osage Tribe of Indians, on Behalf of Said Tribe and the Members Thereof,

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vs.

HAROLD L. ICKES, Secretary of the Interior of the United States, and TOM H. FRALEY, Treasurer of Osage County, Pawhuska, Oklahoma,

Respondents.

BRIEF OF TOM H. FRALEY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF TOM H. FRALEY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

RULE OF THE COURT

Section 5 of Rule 38 of the Rules adopted February 13, 1939:

"A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, *and will*

be granted only where there are special and important reasons therefor."

There is no special or important reason therefor in this case.

II.
THE QUESTION INVOLVED

The question presented is whether or not the action was properly dismissed.

This involves a determination of the question as to whether or not the United States was an indispensable party to the suit, and petitioners contend that it should involve a determination of the question as to whether or not Section 5 of the Osage Act of March 3, 1921 (41 Stat. L. 1249) was unconstitutional.

III.
STATEMENT OF THE CASE

An accurate concise statement is contained in the opinion of Mr. Justice Miller for the Three-Judge Court reported 45 Fed. Sup. 179.

IV.
SUMMARY

The application for writ of certiorari should be denied for these reasons:

1. The United States is an indispensable party.

(a). The United States is trustee in possession of the fund and is guardian of the Osage Indians and is acting under authority of Congress. The acts performed or anticipated by the Secretary

of the Interior are not his acts but the acts of the United States itself under authority of and by direction of Congress. If those acts are wrongful or unlawful, it is the United States and not the Secretary who is liable and responsible.

(b). Counsel for petitioners freely admitted in their oral argument before the Court of Appeals and also before the Three-Judge Trial Court the pendency of their action before the United States Court of Claims to recover from the United States the sum of $1,092,338.17 and about three-quarter million dollars in interest thereon, by reason of payments theretofore made by the United States for the construction of roads and bridges in the Osage Indian Reservation which payments had been made by reason of and under the terms of the questioned act. (In the Court of Claims of the United States, Congressional No. 17, 763, THE OSAGE TRIBE OF INDIANS, Plaintiff, v. THE UNITED STATES, Defendant). Counsel also admitted their desire to secure in this action an adjudication of the unconstitutionality of the questioned act to be used by them in their suit against the United States before the Court of Claims. The actual vital interest of the United States in this action therefore becomes an admitted fact.

(2). The suit on its face involves only $1,535.70 and less than the amount over which the federal courts will ordinarily take jurisdiction.

(3). The petitioners have an adequate remedy at law and should not be permitted to maintain this action

in equity. They could very easily add the $1,535.70 to the $1,092,338.17 and interest, which they are seeking to recover from the United States in their pending action in the Court of Claims, if the United States should pay out the $1,535.70 in compliance with the direction of Congress.

(4). The act complained of is constitutional whether regarded:

(a). As a disbursement of Indian funds by the United States for the benefit of the Indians, or,

(b). As a tax upon their property.

V.
PETITIONERS' ERRORS

1. Petitioners erroneously assume that they should be entitled to secure an adjudication which would have the effect of fixing liability against the United States for a sum in excess of one million dollars and interest without the presence of the United States as a party to that suit.

2. The petitioners overlook or disregard the plenary power of Congress over the Indians and their property, and

3. Erroneously assume confiscation and spoliation of the Indians' money while alleging the use of the money for the construction of roads and bridges on the Osage Indian Reservation.

VI.
THE QUESTIONED ACT

Section 5 of the Act of March 3, 1921, (41 Stat. L. 1249):

"Sec. 5. That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

VII.
ARGUMENT

1.
The United States Is An Indispensable Party To This Action

The United States actually holds the legal title to the minerals from which the royalties accrue in trust for the Osage Tribe. The lands, including the minerals thereunder, were conveyed to the "United States of

America in trust for the use and benefit of the Osage Indians" under authority of the Act of Congress of March 3, 1883 (22 Stat. L. 603). Under the Osage Act of June 28, 1906, sub-section 7 of section 2, the minerals were reserved for the use of the Tribe, the title remaining in the United States. By later acts the minerals are still so reserved and the United States still holds the legal title to them in trust for the Osage Indians.

The act of June 28, 1906, provided for the leasing of those lands for the discovery and development of oil.

The funds owned by the Osage Tribe were segregated by the provision of the Osage Act of June 28, 1906, commonly called the Allotment Act. The minerals were not segregated and could not be alienated by any one without further authority from Congress, which has never been granted, except as to the leasing for development.

The legal title to the minerals still remains in the United States.

The first paragraph of Section 4 of the same Allotment Act reads as follows:

> "Sec. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided."

By Section 1 of the Act of March 3, 1921, the mineral trust period was extended to April 8, 1946.

By Section 1 of the Act of March 2, 1929, the trust period was further extended to April 8, 1958.

There is no allegation in the complaint that the $1,092,338.17 was not used for the construction of roads and bridges in the Osage Reservation and there is no allegation that the $1,535.70 will not be so used. The only thread upon which the petitioners' whole case hangs is the untenable contention that Congress cannot use tribal funds to construct roads and bridges on the tribal reservation, which contention finds no support in any case cited by the petitioners or in any case which we have been able to find in the books. In fact, the only way the allegations of the complaint attempt to support the contention is by calling the expenditures confiscation and spoliation, and at the same time admitting, as they must admit, that the expenditure was for roads and bridges with an obligation on the part of the United States to see that the money was so expended.

The interest of the United States in these royalties is much deeper than that of an ordinary trustee in possession:

1. The United States is interested in and responsible for the welfare of the Indians and of their property. The United States is the guardian of the Indians and of their property; it has assumed the responsibility of looking after the Indians and their property, of determining on its own exclusive responsibility what is for the best interest of the Indians and just how their funds are to be expended to further that best interest. Neither the Indians, nor the state, nor the courts have

any authority in the matter. The use to be made of these royalties is a matter for the United States and the United States alone to determine. There is no power on earth which can question the authority or wisdom of whatever action the United States might take with reference thereto so long as there has not been confiscation or spoliation of that property.

2. The United States is interested in the disbursement of this $1,535.70 for it was still the responsibility of the United States and of the United States alone, to determine how the $1,535.70 should be expended.

3. The United States is interested in the determination of the question of the constitutionality of the provisions of the act being attacked for thereby hangs the determination of the question as to whether or not the United States should be held liable for the repayment to the Osage Tribe of $1,092,338.17 and interest thereon. The United States has allowed itself to be sued in the Court of Claims for the return of this fund and the petitioners have taken advantage of that opportunity, but here they are admittedly seeking an adjudication that the United States is liable in the absence of the United States as a party to the litigation.

The case of *Morrison* v. *Work*, 266 U. S. 481, 69 L. Ed. 394, is conclusive against the right of the petitioners to maintain this action without making the United States a party.

The analogy in that case to the present situation is close, if not exact.

There the property involved was tribal property held in trust by the United States.

Here it is tribal property held in trust by the United States.

There and here the United States acted as "guardian for the Indians" and as "trustee in possession."

There the four grounds of complaint were that the Secretary of the Interior by carrying out the provisions of six acts of Congress had subjected the Chippewas to great loss and threatened further injury, and that the six acts of Congress were void because they deprived the Chippewas of property in violation of the Constitution.

Here it is the contention that the Secretary of the Interior has injured the petitioners by paying out money as authorized by Congress and threatens further to injure them by paying out $1,535.70 more in violation of the Constitution.

In regard to those four grounds of complaint in the Morrison case the Supreme Court said (page 397 of 69 L. Ed.):

> "The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials would interfere with the performance of governmental functions, and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued. The bill, so far as it complains of acts done pursuant

to the later legislation, was properly dismissed for this reason, among others."

The petitioners seek comfort from the following language in the opinion in the Morrison case (page 397 of 69 L. Ed.):

> "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised."

But notice the next statement in the opinion (page 397 of 69 L. Ed.):

> "In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff, or it operated to cause a cloud upon his property. In some of these cases the defendants would have been liable individually in trespass unless he could justify under authority conferred."

Notice that before an injunction will issue against an officer of the right of the plaintiff must be "definite," and we would say, not dependent upon the court determining that the act authorizing the conduct is unconstitutional. The court did so definitely decide in its decision with reference to the four grounds of complaint.

Then notice this further statement in the Morrison case (p. 398 of 69 L. Ed.):

> "If through officials of the United States these lands, or the proceeds thereof, or the accruing interest, are improperly disposed of, *it is the United*

States, not the officials, which is under obligation to account to the Indians therefor. In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the government administered according to law and the public moneys properly applied. Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the government by a suit to which the United States is not, and cannot be made, a party."

The petitioners are accusing the United States of improperly administering a trust. They seek to obtain an adjudication to that effect without making the United States a party, yet, if there is liability, it is the United States and not the trust officer of the United States who is liable.

Here and in the Morrison case it is not merely a question of an administrative official exceeding his authority. From such conduct he might be enjoined, but here and in the Morrison case the attempt is to enjoin an alleged unlawful act and to affix the liability on the United States, which is not a party to the suit. To state it still differently, it is not merely an administrative matter which the petitioners seek to control, but it is a trusteeship. It is a fiduciary matter, in which the fiduciary may be called upon to account, if he has violated the trust. The fiduciary is a necessary party to any suit which would control his conduct or affix him with liability.

See *Thayer* v. *Life Association of America*, 112 U. S. 717, 28 L. Ed. 864.

In the case of *Miles* v. *Caldwell*, 2 Wall. 35, 17 L. Ed. 755, and many times since, this expression has been used:

> "Courts of equity are not restrained by technicalities, but look past the nominal parties to the real parties."

The real defendant here is the United States, who cannot be made a party defendant.

In view of the frank admission in open court of the attorneys for the petitioners that they seek to obtain here an adjudication of unconstitutionality in order to use the judgment to sustain their suit against the United States in the Court of Claims, it would seem that this Court in its decision here could find and hold that the real purpose of this suit is as admitted by counsel for petitioners, but in any event the bill alleges illegal payment to the County of Osage in the sum of $1,092,338.17 and as the United States is, and was, the trustee of that fund, the Court must conclude, as did the Supreme Court in the Morrison case, that, if the officials have acted erroneously, it is the United States and not the official which is under obligation to account.

We invite the Court's attention to this language in the case of *Louisiana* v. *McAdoo*, 234 U. S. 627, 58 L. Ed. 1507:

> "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, *but by the effect of the judgment or decree which can here be rendered. Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954, 962, 22 Sup. Ct. Rep. 650; *Kansas* v. *United States*, 204 U. S. 331, 333, 51 L. Ed. 510, 27 Sup. Ct. Rep. 388."

To the same effect see *Wells* v. *Roper*, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 775; *Transcontinental & Western Air* v. *Farley*, 71 Fed. (2d) 288; *In re: Ayers*, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216.

The following is from *Belknap* v. *Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599:

> "(P. 602). But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. *Louisiana* v. *Jumel*, and *Elliott* v. *Wiltz*, 107 U. S. 711, 720, 728 (27:448, 451-454); *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446, 454-457 (27: 992, 995, 996); *Hagood* v. *Southern*, 117 U .S. 52, 70 (29:805, 811); *Re: Ayers*, 123 U. S. 441 (31:216); *North Carolina* v. *Temple*, 134 U. S. 22 (33:849); *McGahey* v. *Virginia*, 135 U. S. 662, 684 (34:304, 312)."

It seems to us that the petitioners are in the very inconsistent position of asking this Court to determine that section 5 of the Act of Congress of March 3, 1921, is unconstitutional, which, at least according to their contention, will create the foundation for liability of $1,092,338.17, and interest, against the United States, and at the same time they insist that the United States is not a necessary party to this litigation.

How can the Court fail to hold that the United States is so directly involved that it is the real party in interest? Certainly, if the relief, which is sought, should be granted, the judgment would operate against the sovereign.

The case of *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, quoted from by the petitioners is not in point. There it was contended that the United States was an owner of the water rights involved and was, therefore, a necessary party to the suit. The Supreme Court found that the United States did not own the water rights; that they were "appurtenant to the land irrigated," and that the water rights belonged to the respondents (the land owners); that the ownership was in them and "not in the United States." Hence, the United States was not a necessary party to the suit. It was further found and held that the secretary was endeavoring to carry out an order which would deprive the land owners of vested rights, and that an officer is not protected from "personal liability" to persons whose rights of property he has wrongfully invaded, and that consequently the invasion might be stopped without making the United States a party to the suit.

In the case at bar no personal liability could attach to the Secretary of the Interior and the United States does have a substantial interest in these trust funds.

Petitioners have quoted from the case of *Barr* v. *Rhodes*, 35 Fed. Supp. 223, but did not quote the following portion of the opinion (page 225):

> "(5, 7). The rule seems to be that the courts will not interfere with matters entrusted by Congress to the discretion of the heads of executive departments of the government, but that they will enjoin acts which are beyond the scope of statutory authority or jurisdiction of executive officers."

In the case at bar it is not the act of an officer of which the petitioners complain, but it is the acts of the

United States itself in using the royalties for the construction of roads and bridges and in directing the Secretary of the Interior to see that they are so used; so that it is the United States itself which is interested in the litigation and not merely an administrative official.

The case of *Banco de Espana* v. *Federal Reserve Bank*, 114 Fed. (2d) 438, is no help to the petitioners. There it was held that the United States Lines Company and the Federal Reserve Bank could be sued because:

> "(Page 448) One was a common carrier sued for damages for making a claimed illegal disposition of the plaintiff's property. The other was an independent corporation which had obtained possession of the plaintiff's property and allegedly had wrongfully disposed of it. Both were sued for damages. Judgment should go in their favor on the merits."

It was then held that Solomon, the Superintendent of the United States Assay Office, could not be sued for he was custodian of the silver for the United States:

> "In the case of Solomon, however, the evasion of the ordinary rule of immunity seems too direct to be countenanced, for he was at most a mere custodian of the property for the United States. Under the law and the specific instruction given him in these particular instances, his duties were only ministerial."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, was a suit to restrain a criminal prosecution. In the opinion it is said, on page 576:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

It has been pointed out that in the case at bar the Secretary could not be personally liable for it is the conduct of the United States which the petitioners have challenged. They contend that the use of the money for the construction of roads and bridges for the Osage Tribe is not lawful because Congress did not have power to direct that to be done. Congress, however, did direct it and the executive branch of the government carried out that direction. Now if that conduct were prohibited by the Constitution it is the United States who wrongfully paid out the money and it is the United States which must suffer. Then certainly the United States has a right to be heard in any action which seeks to determine that the act in question is unconstitutional.

When a judgment would affect the interest of the United States the United States is an indispensable party. Even if the United States is not a party to the suit, but its interest is so involved that it is the real party in interest the suit may not be maintained. The United States must be made a party in determining the question as to whether or not the authorty under which the Secretary acted was legally conferred because the United States would be adversely affected by a judgment holding that the authority was not legally conferred.

We quote from *Transcontinental & Western Air, Inc.*, v. *Farley*, 71 Fed. (2d) 288, wherein it is said, (p. 290):

> "(1, 2) At the outset, we must consider an initial inquiry, and that is whether this suit is one against the United States. If the interest of the United States is substantially affected, the suit can-

not be maintained, since the United States cannot be made a party to such a suit without its consent. *U. S. ex rel. Goldberg* v. *Daniels*, 231 U. S. 219, 34 S. Ct. 84, 58 L. Ed. 191. The determinative factor is the effect of the judgment. *Louisiana* v. *McAdoo*, 234 U. S. 627, 34 S. Ct. 938, 58 L. Ed. 1506. Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is the real party in interest and any relief that might be given in such a suit will operate against the sovereign, it is an indispensable party, and the suit cannot be maintained. *Morrison* v. *Work*, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394; *Wells* v. *Roper*, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134; *Belknap* v. *Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599."

A judgment favorable to the petitioners would operate against the United States in that the Court would be determining for the United States the policy which the United States must follow with reference to the Indians and their property, which is the specific duty and obligation of the United States alone; it would operate against the United States by prohibiting the disbursing of these royalties in the manner in which the United States had determined they should be used; it would operate against the United States by establishing a liability against the United States in favor of the petitioners in the amount of $1,092,338.17 and interest, and it would operate against the trusteeship of the United States for the Indians and their property, which is operating against the United States.

The case of *Minnesota* v. *United States*, 305 U. S. 382, 83 L. Ed. 235, says that (2nd syllabus):

> "A proceeding against property in which the United States has an interest is a suit against the United States."

In the course of the opinion in the Minnesota case, which deals with Indian lands held in trust by the United States, the Court said:

> "As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, chap. 333, 47 Stat. at L. 474, 25 U. S. C. A. sec. 490a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions."

The United States in this Osage case is trustee in possession of the $1,535.70 and is directly responsible for its proper disbursement and is, therefore, interested in any suit which seeks to direct how, when or in what manner said funds shall be disbursed, or whether or not they shall be disbursed at all.

The United States has determined upon a policy calling for the use of this $1,535.70 for the construction and maintenance of roads and bridges in the Osage Reservation. The petitioners say that that policy is wrong and that it contravenes the Constitution and cannot be carried out. The United States is interested in the result in order that it may know whether or not its trusteeship is so hampered and limited. Even if petitioners

are right as to what use may be made of the money, it is still the United States which is interested and not the Secretary for the policy was not adopted by the Secretary, but by the United States.

2.

The Petitioners Have An Adequate Remedy At Law And Should Not Be Permitted To Maintain This Action In Equity

Section 267 of the Judicial Code, which is section 384, Title 28 USCA, provides that suits in equity shall not be maintained in any case where a plain, adequate and complete remedy may be had at law.

The Supreme Court of the United States in the case of *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737, fully sustains this rule and statute on which it is based and states that "the prohibition is not to be disregarded."

As the petitioners have already brought a suit before the Court of Claims they are not in position to claim that the remedy is not complete or adequate.

3.

The Act Complained Of Is Constitutional

It is our view that the 1% payment from the royalty for roads and bridges was a provision made by Congress for the benefit of the Osages, just as Congress, throughout the history of governmental relations with the Indians, has provided for the construction of schools, churches, agency buildings, blacksmith shops, hospitals

and the like, with tribal funds, and just as Congress has used tribal funds for the maintenance of schools, Indian police and administration of Indian affairs by the employment of Indian agents and clerical forces. We think a complete detail history of the Indian tribal funds would show numerous instances of construction and maintenance of roads upon their reservations from those funds.

If this 1% payment is a tax, there can be even less grounds for complaint against it, for we believe it is admitted that Congress may determine when the property of the Indian may be taxed, and the Supreme Court has by a number of decisions, some of them quite recent, precluded the possibility of this 1% payment being condemned as a prohibited method of taxation.

The allegations of the bill itself refute the alleged conclusions that the 1% is confiscatory. In the first place a tax of 1% could not be confiscatory for there remains the 99%, and while $1,000,000.00 was being expended for the construction of and maintenance of roads and bridges there remained $99,000,000.00 which was not so used and which was paid to the Osages or held by the United States in trust for them. With the State of Oklahoma being paid 3% until 1935 and then 5% until 1940, there still remained to be paid to the Osages between $94,000,000.00 and $96,000,000.00 during the time that the $1,000,000.00 was being used for the construction of roads and bridges in their reservation.

In the case of *British-American Oil Producing Company* v. *Board of Equalization of the State of Montana*, 229 U. S. 159, 81 L. Ed. 94, the Supreme Court of the United States held, or rather assumed, that Congress had the power to authorize the State of Montana to levy a gross production tax on the oil and gas of the Blackfeet Indians in the State of Montana.

(a). The Plenary Power of Congress In Indian Matters

The United States Government has undertaken the responsibility of looking after the Indians and their property.

While the United States is the trustee of the Indian tribal property, it has, by the very nature of the trust, assumed greatly enlarged powers from those of an ordinary trustee. The United States is not only the trustee of the property, but it is also the guardian of the Indians with the duty and power of using its best judgment in the handling of the Indians' property for their best interest, and the court will not inquire as to whether or not the judgment of Congress in any particular matter has been good or bad. Their sole inquiry is as to whether or not the will of Congress has been carried out, and, if so, the courts do not interfere with the guardianship or with the administration of the trust.

The home of the Osage tribe was Osage County. The Osages lived there. They had selected homestead allotments all over the county. They were rapidly developing the minerals, which required extended hauling

of heavy machinery and equipment all over the county and often times to the most inaccessible places. We may assume that the Court will take judicial knowledge of the fact that Osage County is traversed by many streams, and that automobiles were coming into general use at the time of the enactment of this legislation and that the Osage Indians with their income had automobiles.

The 1% was not confiscated or appropriated by the Government. It was not given to any one. Congress provided for its use for the construction of roads and bridges and for an accounting to see that it was so used.

We direct the Court's attention to the case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. Ed. 299. From the statement of the facts in the opinion it appears that the Kiowa and Comanche Indians had 350,000 acres of mountainous lands and 2,150,000 acres of lands suitable for farming and grazing.

Over the protest of the Indians Congress in 1900 provided for allotment of not over 320 acres of land to each male Indian of 18 years of age or over (it appearing that there were about 725 of them) and provided further for the setting aside of 480,000 acres for the use in common of the Kiowas, Comanches and Apaches, confirmed title in religious and educational associations to the lands occupied by them, and provided for payment to the Indians of $1.00 per acre for the remaining lands and settlement of those lands by whites. Lone Wolf and others contended that the Act of Con-

gress was unconstitutional; that the tribal lands were worth $2.50 an acre; that the act violated the treaties of the Tribe; that it was a taking of their lands for the whites without due process of law. A permanent injunction against the enforcement of the act was prayed for. We quote from 47 L. Ed. 299:

> "Syllabus. The *Plenary power* of Congress over the tribal relations *and lands* of the confederated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900 (31 Stat. at L. 677, chap. 813), providing for allotments to the Indians in severalty out of the lands held in common within the reservation, and purporting to give an adequate consideration for the surplus lands, not allotted among the Indians or reserved for their benefit.
>
> "(From opinion p. 306). That Indians who had not been fully emancipated from the control and protection of the United States are subject *at least so far as the tribal lands were concerned*, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 30 L. Ed. 306, 314, 7 Sup. Ct. Rep. 75, and *Stephens* v. *Choctaw Nation*, 174 U. S. 445, 483, 43 L. Ed. 1041, 1054, 19 Sup. Ct. Rep. 722.
>
> "In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property we may not specially consider the contentions pressed upon our notice, that the signing by the Indians of the agreement of October 6, 1892 was obtained by fraudulent misrepresentations, and concealment, that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by

Congress without submitting such amendments to the action of the Indians, *since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.*

"The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches, and Apaches still existed and the statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S.294, ante, 183, 23 Sup. Ct. Rep. 115, decided at this term, where it was held that *full administrative power was possessed by Congress over Indian tribal property.* In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. *In any event, as Congress possessed full power in the matter,* the *judiciary cannot question or inquire into the motives which prompted the enactment of the legislation.* If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

To the same effect see *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. Ed. 183, wherein it is held

that the United States had properly assumed full control over the Cherokees and took upon itself a determination of membership in the tribe for the purpose of adjusting their rights in *"tribal property."*

> "(From opinion p. 183) *The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate,* as it had done through the act of 1898, directly for the protection of the *tribal property,* was in that case reaffirmed."

In *Re: Heff,* 197 U. S. 488, 49 L. Ed. 848, 25 S. Ct. 506, it was held that it was not within the power of the courts to overrule the judgment of Congress and that when the purpose of Congress had been made clear by its legislation *"the question is at an end."*

In *United States* v. *Kagama,* 118 U. S. 375, 30 L. Ed. 228 it was held that the Indians and their property are necessarily subject to the laws which Congress may enact for their protection *"and for the protection of the people with whom they come in contact."* It was further said that:—*"The soil* and the people within these limits are under the political control of the government of the United States."

In *Williams* v. *Johnson,* 239 U. S. 414, 36 S. Ct. 150, 60 L. Ed. 358, it was held that Congress has "plenary" control over the tribal relations and *"property"* and that this power continues after the Indians are made citizens.

To the same effect see *Barker* v. *Harvey,* 181 U. S. 481, 21 S. Ct. 690, 45 L. Ed. 963, and *Walker* v. *Brown,* 43 Okla. 144, 141 p. 681.

There is no question of the taking of property without due process of law; there is no question of the taking of property. None is being or has been taken. One per cent of the royalty has been expended under and by virtue of the authority and directions of Congress for the construction and maintenance of roads and bridges in the county where the Osages live, where the minerals were being developed, where the Osages were driving thir automobiles to and from their homes, and where they were in the pursuit of welfare and happiness. It must be presumed that Congress acted in good faith and the courts will not question the wisdom of Congress in its determination as to what was for the benefit of the Osage tribe.

The case of *United States* v. *Creek Nation*, 298 U. S. 103, 79 L. Ed. 1331, does not present an analogy to the situation here.

There the Creek Nation ceded one-half of its lands to the United States for the Sac and Fox Indians. The dividing line was surveyed and division was established and agreed upon by the Creeks and the Government. Later surveys included 5575.57 acres of Creek lands within the Sac and Fox area, but the Government accepted and approved these later erroneous surveys and sold the 5575.57 acres of Creek lands and deposited the proceeds of the sales in the Treasury of the United States as public money. That was a Court of Claims action and it was agreed in the trial of that case that the United States had appropriated or confiscated the land.

The Supreme Court held that this action on the part of the United States was not control and manage-

ment of the Creek property, but was a confiscation of it. The court said that the power of the United States over the Indians and their property "did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming the obligation to render, just compensation for them; for that would not be an exercise of guardianship, but an act of *confiscation.*"

There was no act of Congress providing for the appropriation of the Creek lands. It was simply an error in the administration and hence does not involve the authority of Congress.

In the case at bar Congress did not give the one per cent of the royalties to others, or appropriate it to its own use, but provided for its expenditure by its agency, Osage county, for the benefit of the Osages themselves.

The case of *Shoshone Tribe* v. *United States,* 229 U. S. 476, 81 L. Ed. 360, is another Court of Claims case. The complaint is against the United States for having appropriated for the Northern Arapahoes one-half of the Shoshones' reservation contrary to the treaty provisions with the Shoshones. This was also an act of administration. In fact the Arapahoes were moved in on the Shoshones under army escort. It really amounted to the taking by force of a part of the Shoshone reservation although Congress some years later recognized the Arapahoes as having equal rights in the reservation with the Shoshones. The result was that the United States just took one-half of the Shoshone reservation away from them and gave it to the Arapahoes. Congress then in 1927 provided for this action in the Court of Claims.

The Supreme Court called the taking "spoliation" which very clearly distinguishes it from the case at bar. We quote from the opinion p. 369 of 81 L. Ed.:

> "Power to *control and manage* the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564-566, 47 L. Ed. 299, 305, 306, 307, 23 S. Ct. 216. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that "would not be an exercise of guardianship but an act of confiscation".' *United States* v. *Creek Nation*, *supra*, (295 U. S. 110, 79 L. Ed. 1335, 55 S. Ct. 681); * * * The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only but it is 'as sacred as that of the United States to the fee.' *United States* v. *Cook*, *supra* (19 Wall. 593, 22 L. Ed. 211); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. Ed. 299, 23 S. Ct. 216, *supra*; *Choate* v. *Trapp*, 224 U. S. 665, 671, 56 L. Ed. 941, 944, 32 S. Ct. 565; *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 71 L. Ed. 294, 47 S. Ct. 142, *supra*. *Spoliation is not management.*"

In *Chippewa Indians* v. *United States*, 301 U. S. 358, 81 L. Ed. 1156, it was decided as a question of fact that the Red Lake Reservation in Minnesota had always belonged to the Red Lake Band of Chippewa Indians and not to the entire tribe of the Chippewas and that the Government had for years so considered. Then the question was whether or not under the Chippewa Allotment Act, Congress had intended to consider the Red Lake Reservation as belonging to the entire tribe or just to the Red Lake Band. The Court decided that Con-

gress had intended to recognize that the Red Lake Reservation belonged to the Red Lake Band and that it was to be handled for their benefit and not for the benefit of the entire Chippewa Tribe.

The Court said any other construction of the Act would be taking the Red Lake Reservation from the Red Lake Band and giving it to the entire Tribe, which could not be done for the property of an Indian band or tribe cannot be taken from it and given to another band of the tribe. This language is used: (p. 1167 of 81 L. Ed.)

> "Our decision, while recognizing that the Government has power *to control and manage the property* and affairs of its Indian wards in good faith for their welfare, show that this power is subject to the constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own."

No act of Congress was held invalid in any of those three cases relied upon by the petitioners. The acts complained of were all administrative. The Interior Department had exercised its authority and had dealt arbitrarily and capriciously with tribal property; had actually confiscated it for the benefit of the United States itself in the one instance and for other tribes in the other instances.

From consideration of these authorities it is apparent that the petitioners are asking this Court to hold that Congress had in this instance confiscated one percent of the royalty; that spoliation has been committed, but this Court will not question the good faith of Congress or its wisdom. That Congress did not intend confiscation or spoliation is evident from the language of

the Act itself, which provided for the expenditure of one percent of the royalty produced in Osage county, and provided for an accounting by the agency authorized to do the spending; so that it might be seen that the one percent was expended as authorized.

It requires no strained retrospect to understand and appreciate that Congress believed those expenditures to be beneficial to the Osages from the standpoint of the development of their property, and it requires only a cursory knowledge of the present to know that the expenditure was so beneficial to the Osages. Certainly no court could just merely assume that it was not and thereby declare the Act confiscation and spoliation.

And it makes no difference that Osage county, Oklahoma, was to build the roads and bridges. Congress could as well have directed the Secretary of the Interior to build them, but in its wisdom it chose Osage County and the county was merely an agency of Congress or of the United States Government in fulfilling the requirements of Congress. We find an analogy in Oklahoma as to such agency for the Government.

Congress has at times designated the County Courts of Oklahoma to act in certain capacities and one of them was to approve certain conveyances of the members of the Five Civilized Tribes and the courts have held that the County Court, when acting in such capacity, was merely the ministerial agency of the Federal Government.

We quote from *Parker* v. *Richards*, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 954, on page 957:

"It is the agency selected by Congress, and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court, in exercising that authority, acts as a Federal agency; and this is recognized by the Supreme Court of the state. *Marcy* v. *Seminole County*, 45 Okla. 1, 144 p. 611."

By taking judicial knowledge of the geography of the Osage Reservation, now Osage County, this Court will be aided in seeing that Congress was not acting unwisely and that the one percent was really an insignificant part of the amount required to be expended for roads and bridges.

The reservation contains approximately 2300 square miles of land. Straight across at its longest and widest points it is 60 miles long and 60 miles wide. It is considerably larger than the state of Deleware and has one-fourth the land area of the State of Maryland. It is 43 miles from Pawhuska, the county seat, to Ponca City, which borders Osage county on the west, and it is 55 miles from Pawhuska to Tulsa, which borders Osage county on the southeast. $50,000.00 a year for twenty years would not build and maintain one hard surfaced road across the county either way, if there were no streams to be bridged—and as a matter of geographical fact, there are many.

One other suggestion is important.

The Act of April 25, 1940, 54 Stat. 168 (Public Resolution No. 66, 76th Congress [H. J. Res 289]), is an amending act authorizing the State of Oklahoma to continue to collect five percent (the existing rate) of

the gross production of the Osage royalties, but upon the express condition that an additional one-fifth of said sum so paid by the Secretary in pursuance of the Act should be delivered over to Osage County, Oklahoma, at the same time or times as the other payment or payments therein provided for are made to said county, "one-half thereof to be apportioned to a fund to be used by said county only for the construction and maintenance of roads and bridges therein, the other one-half thereof to be used for the maintenance of common schools of said county as provided by law."

Congress here again directed the use of a small portion of the Osage royalties for the construction and maintenance of roads and bridges in Osage county, and added schools as another public benefit for which a small portion of the royalties was to be used.

Under the holding by the Supreme Court of the United States in the case of *British-American Oil Producing Company* v. *Board of Equalization of the State of Montana*, 299 U. S. 159, 81 L. Ed. 94, such an enactment was held constiutional. Yet the same and an additional public use is being made of the royalties.

(b). It Does Not Help The Petitioners To Construe The One Percent Expenditure To Be A Tax

Congress has power to permit the taxation of Indian property.

In *British-American Oil Producing Co.* v. *Board of Equalization of the State of Montana*, 299 U. S. 159, 81 L. Ed. 94, a production tax on oil and gas royalties of the Blackfeet Indians was sustained.

The case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941, also concedes the power of Congress to permit taxation of Indian property.

By the holding of this Court in the case of *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, it is definitely established that it is wholly immaterial that the other inhabitants of Osage County, Oklahoma, or for that matter, the inhabitants of other counties or states, may have received some benefit from the construction of the roads and bridges from this fund. It is not even required that the Osages receive direct benefit from the tax at all. Of course as a matter of fact they were greatly benefitted. They needed the roads for their own benefit and for the benefit of those with whom they had business transactions and tribal and social relations.

This Court has said that the only benefit a taxpayer was constitutionally entitled to receive was to be derived from "his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes to public purposes."

Prior to 1921 the Osages had been allotted all of the lands in Osage County, except the townsite, school, and church reservations, and they still owned the lands, except those who had received certificates of competency may have sold some of their surplus lands.

The following if from the syllabus to *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573, 82 L. Ed. 1024:

"5. Syl. A distinction in legislation is not arbitrary, and so violative of the equal protection clause

of the Fourteenth Amendment, if any state of facts reasonably *can be conceived that would sustain it.*"

Then classification is permissible, if there is any conceivable state of facts on which to base it.

In this instance the Osages owned all of the royalties, and they owned all of the lands, or most all of it. They were developing their minerals. Any one of those things would have afforded a "conceivable" reason for the classification.

The Osages had theretofore paid no taxes on their oil development. They had much land exempted from any sort of taxation. They were receiving the greatest benefit from the construction of roads and bridges.

They were the only members of the class of royalty owners in the county. They were the only class of royalty owners in the county. There were no other royalty owners who could be taxed. There was no other class like them.

There could be no discrimination against them for the money was to be used for the benefit and improvement of their property and for their convenience and pleasure.

Congress may classify, distinguish, and select for the purpose of taxation. See *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 31 S. Ct. 171, 55 L. Ed. 137; *Stebbins* v. *Riley*, 268 U. S. 137, 49 S. Ct. 424, 69 L. Ed. 884; and *Nashville C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254.

The producers of the oil were not in the same class as the royalty owners. The producers had to prospect

for, develop, and produce the oil at very great cost; and the lands were not theirs and Osage County was most often not their home. It is a matter of common knowledge that the cost of production of oil is great and that where the production is small the cost exceeds the value of the oil produced, but the Osages received the royalty no matter what the cost of production.

Of course an answer in this case would show additional facts justifying the payment of this 1% from the royalties for roads and bridges but it is assumed that this Court will take judicial knowledge of these historical facts:

1. The Osage Tribe of Indians moved from Kansas to the Osage Nation (now Osage County, Oklahoma), about 1872.

2. The tribal lands including the minerals were conveyed to and held in trust by the United States for the Osage Tribe.

3. The lands were allotted in severalty, but the minerals were reserved and are still held in trust by the United States for the Indians and are to be so held until 1983.

4. Some tribal lands were leased for oil even prior to the time of allotment.

5. Congress has from time to time provided for the use of tribal royalties from oil and gas for the construction of agency buildings, schools, blacksmith shops and the like, and has used their funds for administrative, educational, religious and other purposes.

6. That under authority of Congress 1%, or $1,092,337.17 of the Osage tribal royalties were expended on roads and bridges in the Osage Nation.

7. The homestead allotments were, and still are, exempt from taxes in the hands of the original allottee, and also in the hands of his heirs of one-half or more Indian blood since 1929.

8. The surplus lands were exempt from taxation for three years after allotment.

9. The mineral interest of the tribe and the royalties were entirely exempt from taxation until 1921. Then the State of Oklahoma was authorized to collect a gross production tax on the oil and gas royalties in lieu of all other state and county taxes on the production of oil and gas, and the Secretary of the Interior was authorized to pay to Osage County one percent of the royalties to be used for the construction of roads and bridges in Osage County, and the county was required to account to the Secretary of the Interior for that expenditure.

VIII.
CONCLUSION

The suit of the petitioners is based upon two fundamental errors:

FIRST: In relying literally upon the statement that an officer of the United States may be sued without joining the United States, when the authority under which he is acting has not been legally conferred, without taking into consideration the purpose of the suit or the effect of the judgment to be rendered.

If the purpose of the suit is to secure the rendition of a judgment which would adversely affect the United States, if it should be decided that the authority under which the officer has been acting had not been legally conferred, then obviously the United States is a necessary party before the question can be determined as to whether or not the authority had been legally conferred; certainly before it could be determined that the authority had not been legally conferred and a decision rendered which would affix the United States with liability or adversely affect its substantial interest.

The courts look beyond the nominal parties through the form of the action to determine its real purpose and the effect of any judgment which could be rendered. When that is done in this case it is clearly seen that the United States alone, or possibly the United States and Osage County alone, are vitally concerned.

SECOND: The other fundamental error of the petitioners is in assuming that they can change a commendable fact into a condemned one by merely calling it ugly names. Congress decided that it was assisting to improve the financial, economic, commercial, social, educational and religious welfare of the Osage Indians by spending 1% of their royalty income to help build roads and bridges on their reservation, where they were developing their minerals, where they were living on their tax free homesteads, from where they were sending their children to free public schools and to churches, and where they gathered for tribal and social function and over which roads and bridges they traveled to attend business transactions at their Indian Agency. Coun-

sel for petitioners call that confiscation and spoliation, but they cannot change the fact by calling it something which it clearly is not. There is not a single allegation in the bill from which it can be even inferred in the light of historical facts that such an expenditure was not for the best interest of the Osage Indians and certainly there is nothing from which it can be inferred that the expenditure was either confiscation or spoliation.

Then there is not one single authority cited from which it could possibly be concluded that the assistance in building of roads and bridges on the reservations of the Osage Indians from one one-hundredth of their royalty income under the authority and direction of Congress could be held to be an unconstitutional exercise of power.

The suit is wholly without merit in fact and without foundation in law or equity.

Respectfully submitted,

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October, 1942

APPENDIX

APPENDIX

APPENDIX

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In The

Supreme Court of the United States

October Term, 1942

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, Principal Chief and Member of the Osage Tribe of Indians, on Behalf of Said Tribe and the Members Thereof,

Petitioners,

VS.

HAROLD L. ICKES, Secretary of the Interior of the United States, and TOM H. FRALEY, Treasurer of Osage County, Pawhuska, Oklahoma,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia

---

APPENDIX TO BRIEF FOR RESPONDENT, TOM H. FRALEY, TREASURER OF OSAGE COUNTY, OKLAHOMA

HISTORY OF OSAGE LEGISLATION

It is unquestionably proper for this Court to consider the legislative history of the Osages along with the allegations of the complaint.

On December 31, 1838, Martin Van Buren, President of the United States, under authority of Congress, patented to the Cherokee Nation of Indians 14,325,125

acres of land, which included that area which later became the Osage Nation in the Indian Territory.

On July 19, 1866, (14 Stat. at L. 799) the United States concluded a treaty with the Cherokee Nation permitting the United States to settle friendly Indians west of the 96th meridian in the Indian Territory.

The Osage Indians had, up to that time, been located on a reservation in Kansas and by various Acts of Congress the sale of the Osage tribal lands in Kansas and their removel to that part of the Indian Territory, which is now Osage County, Oklahoma, was provided for.

Under authority of the Act of March 3, 1883 (22 Stat. at L. 603), providing for the purchase for the Osage Nation from the Cherokee Nation and conveyance "to the United States of America in Trust for the Osages," the Cherokee Nation on June 14, 1883, conveyed to the "United States of America in trust for the use and benefit of the Osage Indians" what is now Osage County, Oklahoma, the consideration being seventy cents an acre.

The Act of Congress of March 3, 1906 (33 Stat. at L. 1048), provided for the surveying, and authorized the President of the United States to allot in severalty, the lands in the Osage Nation and also provided for leasing for oil and created a townsite commission.

The Act of June 28, 1906 (34 Stat. 539), which is generally referred to as the Osage Allotment Act, provided for the making of a roll of the Osage Indians and provided specifically for the allotment of the lands in severalty to the members of the Osage Nation, each

being entitled to four selections of 160 acres each, and a fifth selection of about 15 or 20 acres, the first selection being designated as a homestead and the balance as surplus. The homestead was to remain inalienable and non-taxable for a period of 25 years, except upon the death of the allottee, and the surplus land was to remain non-taxable for a period of three years, except where certificates of compentency were granted. The act also authorized the granting of a certificate of competency by the Secretary of the Interior, upon determining that the applicant was fully competent to transact his own business. The certificate of competency permitted the holder to alienate his surplus lands, but not his homestead allotment.

Sub-section 7 of Section 2 of this Act of Congress reserved the use of the minerals to the Osage Tribe of Indians for a period of *twenty-five years* and provided that the minerals should become the property of the "individual owners of said land at the expiration of said 25 years, unless otherwise provided for by Act of Congress."

There was to be reserved from allotment areas for townsites, schools and cemeteries.

Section 3 of the Act provided for the leasing of lands for oil and gas by the governing body of the Tribe upon approval of the Secretary of the Interior.

Section 4 provided that all funds belonging to the Osage Tribe or that may "become due" to the Osage Tribe shall be held in trust by the United States for 25 years.

The first sub-section of Section 4 provided for the placing of funds on interest and payment of the interest to the members of the Tribe.

The second sub-section provided that the royalty received from the oil and gas and from the sale of townsites shall be placed in the treasury of the United States and paid out to the individual members of the tribe in the same manner as the interest was to be paid out of the trust fund provided for in sub-section 1.

Sub-section 3 provided that from the royalties from oil and gas a sum not to exceed $50,000.00 per annum for a period of ten years should be set aside for schools on the Osage reservation.

Sub-section 4 provided that from the royalties and land rentals a sum not to exceed $30,000.00 per annum should be set aside for agency purposes and as an emergency fund for the use of the Osage Tribe.

Section 5 provided that at the end of the 25 years the minerals, money and all the property held in trust by the United States should become the absolute property of the individual allotted member of the tribe.

Section 10 provided that roadways might be established on all section lines in the Osage Indian reservation without compensation therefor.

Section 11 of the Act authorized the Secretary of the Interior to make rules and regulations to carry into effect the terms of the act.

Section 10 of the Act of April 18, 1912 (34 Stat. at L. 86), increased the amount which could be ex-

pended from the oil and gas royalties for agency purposes and as an emergency fund from $30,000.00 to $40,000.00 annually.

By the Act of May 25, 1918 (40 Stat. at L. 561), the limit on the amount which could be used from the royalties for agency purposes was removed and that matter was left for determination of Congress each year. There was at that time appropriated $60,000.00 from the royalties for agency purposes for that year and the further sum of $25,000.00 for the construction of a building.

By the Osage Act of March 3, 1921 (41 Stat. at L. 1249) the mineral trust period, which was by the terms of the Allotment Act to expire in 25 years, was extended to April 7, 1946.

Section 5 of the Act of March 3, 1921, is the section directly involved in this litigation. We have quoted said section in the brief proper on page 5.

The Act of February 27, 1925 (43 Stat. at L. 1008), regulated the amount which each Indian might draw from his share of the income to the tribe and provided that the surplus be held in the United States Treasury and authorized certain investments from the funds held in the treasury.

The Act of March 2, 1929 (45 Stat. at L. 1478), further extended the mineral trust period to April 8, 1958, and also provided that:

> "The lands, moneys and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians,

the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until until January 1, 1959, unless otherwise provided by Act of Congress."

The Act of March 2, 1929, contains this further provision:

"Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1939; provided, that the tax-exempt land of any such Indian allottee, heirs or devisee shall not at any time exceed one hundred and sixty acres."

By the Act of Congress of June 24, 1938 (54 Stat. 1034, c 645), the mineral trust period was further extended to April 8, 1983, and that act further provided that:

"Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1984; Provided, that the tax exempt land of any such Indian allottee, heir or devisee shall not at any time exceed one hundred and sixty acres."

By the general Indian Act of June 20, 1936 (49 Stat. 1542) the lands of all Indians purchased with restricted funds were exempted from taxation, and this act has been held to be applicable to the Osages. It was amended by the Act of May 19, 1937 (50 Stat. 188) so as to provide that exemption from taxation should apply only to the homesteads whether in the county or in the towns or cities.

By Joint Resolution of Congress approved April 25, 1940, it was provided that the gross production tax payable by the Osages to the State of Oklahoma should not exceed 5%, and further provided that one-fifth of said 5% should be paid to Osage County to be used one-half in the construction and maintenance of roads and bridges and the other one-half for the maintenance of the common schools of the county. It was further provided that this gross production tax should be in lieu of all other state and county taxes levied upon the production of oil and gas.

Through National Legislation the Indian Territory became the State of Oklahoma in 1907 and the Osage Nation became Osage County, Oklahoma. A county government was established and free public schools were gradually established throughout the county.

Section 5 of the act of March 31, 1921, was amended by the Osage Act of April 25, 1940, as follows:

"That section 5 of the Osage Act (S. 4039, Public Numbered 360, Sixty-sixth Congress; 41 Stat. 1249) be amended to read as follows:

"Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax, not to exceed the existing rate, upon all oil and gas produced in Osage County, Oklahoma, except as herein otherwise provided, and all taxes so collected shall be paid and distributed, and shall be in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma. The gross production tax on the royalty interests of the Osage Indians shall be at the rate levied by said State but in no event to exceed 5 per centum and said tax shall be paid by the Secretary of the Inter-

ior, through the proper officer of the Osage Agency, to the State of Oklahoma from the amount received by the Osage Indians from the production of oil and gas to be distributed in like manner as gross production tax under the laws of said State and the Secretary shall pay the tax herein authorized upon the condition and not otherwise that an additional one-fifth of said sum or sums paid by the Secretary in pursuance of this Act shall be delivered over to Osage County, Oklahoma, at the same time or times as the other payment or payments herein provided for are made to said county, one-half thereof to be apportioned to a fund to be used by said county only for the construtcion and maintenance of roads and bridges therein, the other one-half thereof to be used for the maintenance of common schools of said county as provided by law."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 897

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, PRINCIPAL CHIEF AND MEMBER OF THE OSAGE TRIBE OF INDIANS, ON BEHALF OF SAID TRIBE AND THE MEMBERS THEREOF, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND TOM H. FRALEY, TREASURER OF OSAGE COUNTY, PAWHUSKA, OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, IN OPPOSITION

OPINIONS BELOW

The opinion of the statutory three-judge court (R. 27–39) is reported in 45 F. Supp. 179. The opinion of the court of appeals (R. 54) is reported in 133 F. 2d 47.

JURISDICTION

The judgment sought to be reviewed was entered January 11, 1943 (R. 55). The petition for a writ of certiorari was filed April 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is an indispensable party to a suit seeking to enjoin the Secretary of the Interior from executing an Act of Congress directing him to pay a portion of the royalties from Osage Indian mineral leases to Osage County, Oklahoma.

STATUTE INVOLVED

The relevant portion of the Act of March 3, 1921, c. 120, 41 Stat. 1249, is set out in the Statement, *infra,* p. 4.

STATEMENT

The Osage Tribe of Indians and its chief brought this suit to enjoin the Secretary of the Interior from paying to Osage County, Oklahoma, $1,535.70 out of royalties received from Osage Indian mineral leases. The material facts, as they appear from the allegations of the complaint and from the applicable statutes, may be summarized as follows:

In 1906, Congress provided for the division of the property of the Osage Indian Tribe among its members. Act of June 28, 1906, c. 3572, 34 Stat.

539 (R. 20–24). The lands were allotted to the members of the tribe subject to a twenty-five year restriction upon alienation (sec. 5). However, the rights to oil, gas, coal, and other minerals were reserved to the tribe for twenty-five years, to be leased by the tribal council with the approval of the Secretary of the Interior and under such rules and regulations as he might prescribe (sec. 3). Funds held by the Treasury of the United States for the tribe were to be held in trust by the United States for twenty-five years (sec. 4). The Act directed that these trust funds "shall be segregated as soon * * * as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members * * *, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto" (sec. 4, First). Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the members and distributed "in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States" (sec. 4, Second), a maximum of $30,000 annually being reserved for an emergency fund (sec. 4, Fourth) and a maximum of $50,000 annually for 10 years being reserved for educational purposes (sec. 4, Third). At the end of the twenty-five year period, the mineral interests were to become the "absolute

property of the individual members of the Osage tribe" (sec. 5).

Since 1906, various additional provisions have been made concerning the funds, the term of the reservation of minerals being extended to 1983, and the period of the trust to 1984 by the Acts of March 3, 1921, c. 120, 41 Stat. 1249; March 2, 1929, c. 493, 45 Stat. 1478, and June 24, 1938, c. 645, 52 Stat. 1034.

In 1921, Congress passed the Act here involved. Act of March 3, 1921, c. 120, 41 Stat. 1249. Section 5 thereof authorized Oklahoma to levy a gross production tax upon oil and gas produced in Osage County and provided also (R. 25):

> * * * That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further,* That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only.

Over $1,000,000 has been paid under this Act to Osage County for the construction and mainte-

nance of roads and bridges. In 1940, the direction was changed so as to include the payment for roads and bridges in the gross production tax. Act of April 25, 1940, c. 158, 54 Stat. 168 (R. 25–26). There remains some $1,535.70 which has not yet been paid to Osage County under the 1921 Act. Appellants sought to enjoin the Secretary of the Interior from making this payment, alleging that the provision for payment for roads and bridges was unconstitutional. The complaint also requested the calling of a three-judge court pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. 380a). (R. 2–8.)

The Secretary of the Interior moved to dismiss on the ground that the United States is an indispensable party (R. 9).[1] The statutory three-judge court was convened and, after argument, remitted the case to the district court, it having concluded that the United States was an indispensable party, and hence no constitutional question requiring action by the three-judge court was presented (R. 27–39).[2] The district court thereupon dismissed the complaint (R. 13). The court of appeals affirmed, adopting the opinion of the three-judge court (R. 54).

[1] The defendant Tom H. Fraley, Treasurer of Osage County, likewise moved to dismiss but on different grounds (R. 9–11). Since the court found that the United States is an indispensable party, it did not pass on Fraley's motion.

[2] No issue is presented here as to the correctness of this remand.

ARGUMENT

The courts below held that *Morrison* v. *Work*, 266 U. S. 481, conclusively determines that the United States is an indispensable party to this suit. That case involved the Chippewa Indians whose lands had been ceded to the United States for the purpose of sale, the proceeds to be held as a trust fund for the Chippewas. Act of January 14, 1889, c. 24, 25 Stat. 642. By six later Acts, changes were made in the method of managing and disposing of the lands and in the disposition of the proceeds.[3] In a suit against the Secretary of the Interior, the Secretary of the Treasury, the Commissioner of the General Land Office, and the Commissioner of Indian Affairs, Morrison sought to enjoin the enforcement of these six Acts on the ground that they unconstitutionally deprived the Chippewas of property rights which had been vested in them individually by the 1889 Act. This Court refused to pass upon the question, saying (266 U. S. 481, 485–486):

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[3] For a more complete statement of the items involved in the *Morrison* case, see the opinion in *Morrison* v. *Fall*, 290 Fed. 306. Three of these Acts related to the disposal of timber lands (Act of June 27, 1902, c. 1157, 32 Stat. 400; Act of May 23, 1908, c. 193, 35 Stat. 268, 272; Act of May 18, 1916, c. 125, 39 Stat. 123, 137). The Act of May 24, 1922, c. 199, 42 Stat. 552, 569, authorized the use of $46,570 of the trust funds for educating the Chippewas, and the Act of March 3, 1921, c. 119, 41 Stat. 1225, 1235, authorized the use of $100,000 to promote the civilization and self-support of the Indians.

> The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. Morrison's contention is that, by virtue of the Act of 1889 and the agreements made thereunder, the ceded lands ceased to be tribal property and the rights of the Indians in the lands and in the fund to be formed became fixed as individual property. The Court of Appeals held this contention to be unfounded. We have no occasion to determine whether it erred in so ruling. *The claim of the United States is, at least, a substantial one.* To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. *It is, therefore, an indispensable party to this suit.* * * * [Italics supplied.]

The instant case presents an identical situation. The Osage mineral royalties are trust funds which are being administered by the United States. Even if petitioners' contention that the 1921 Act is unconstitutional (Pet. 4, 7, 8) should be sustained, the funds would not be paid to the Indians but would continue to be administered by the United States as trustee (see Statement, *supra*, p. 3). Accordingly, litigation involving disposition of this property inevitably involves the United States and not merely the Secretary of the Interior. Cf. *Naganab* v. *Hitchcock*, 202 U. S. 473; *Goldberg* v. *Daniels*, 231 U. S. 218. For this

reason, *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *Ickes* v. *Fox,* 300 U. S. 82, and *Barr* v. *Rhodes,* 35 F. Supp. 223 (W. D. Ky), relied upon by petitioners (Pet. 5–7), are irrelevant. All of those cases involved situations in which the Government would have no interest and its officer would be a trespasser if the statute under attack was invalid. As Justice Brandeis stated in the *Morrison* case (266 U. S. at p. 488):

> In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the Government administered according to law and the public moneys properly applied. Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the Government by a suit to which the United States is not, and cannot be made, a party.

Upon the assumption that the 1921 Act confiscated the Indian's property,[4] petitioners suggest (Pet. 7) that the decision in *Morrison* v. *Work* should be overruled. However, no attempt is made to demonstrate any error in the reasoning of

[4] One of the principal reasons for passage of the 1921 Act was to provide roads and bridges which would enhance the value of the Indian's lands, particularly by rendering the mineral lands more accessible. S. Rep. No. 704, 66th Cong., 3d sess.; H. Rep. No. 1278, 66th Cong., 3d sess.; H. Rep. No. 1377, 66th Cong., 3d sess. Thus, the 1921 Act was not a "confiscation" of petitioner's property but was an exercise of Congress' guardianship powers for the benefit of the Osages.

that case. The suggestion is based entirely on the supposition that no other remedy exists. But the usual procedure of testing these Indians' claims by suit in the Court of Claims under special jurisdictional Acts is available to petitioners. In fact, a bill (S. 2926, 76th Cong., 1st sess.) asserting a claim for $1,975,000 representing the amount, with interest, which has been paid under the 1921 Act for roads and bridges has been referred, under Section 151 of the Judicial Code (28 U. S. C. 257), to the Court of Claims (S. Res. 288, 76th Cong., 3d sess., 86 Cong. Rec. 9097) where the matter is now pending. Plainly, under these circumstances, no occasion is presented for re-examination of this Court's decision in *Morrison* v. *Work*. Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359.

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor a novel question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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